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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ROBERT G. AALGAARD,
Petitioner,

vs.

MERCHANTS NATIONAL BANK, INC.,
THOMAS BOLTON, JR., LOUIS FAVRE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

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QUESTION PRESENTED FOR REVIEW

Whether an action for age discrimination under the California Fair Employment and Housing Act is pre-empted by § 24 (Fifth) of the National Bank Act.

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ROBERT G. AALGAARD,
Plaintiff/Appellant,

VS.

MERCHANTS NATIONAL BANK, INC.,
THOMAS BOLTON, JR., LOUIS FAVRE, et al.,
Defendants/Appellees.

WRIT OF CERTIORARI

I

QUESTION PRESENTED FOR REVIEW

Whether an action for age discrimination under the California Fair Employment and Housing Act is pre-empted by § 24 (Fifth) of the National Bank Act.

II

JURISDICTION OF THE COURT

This action is properly before the Court pursuant to 29 U.S.C. § 2101 (c), since this is a Petition for Writ of Certiorari in a civil action within ninety (90) days after entry of judgment or decree by the California Court of Appeal, Third Appellate District, in this matter. The Court of Appeal, rendered their decision and entered judgment against Appellant on October 10, 1990. (See Appendix, Exhibit A.) On January 4, 1991, the Supreme Court of the State of California denied Appellant's Petition for review. (See Appendix, Exhibit B.) On March 29, 1991, Appellant filed a

Motion for Extension of Time to file a Writ of Certiorari before this Court. On April 2, 1991, Appellant's Motion for Extension of Time was granted by this Court giving Appellant until April 19, 1991 to file this Writ.

Pursuant to Rule 10.1(c) of the Supreme Court Rules of the Court, the decision of the California Court of Appeal, Third Appellate District, has decided an important question of federal law, which has not been, but should be, settled by this Court. Namely, whether an action for age discrimination under the California Fair Employment and Housing Act is pre-empted by § 24 (Fifth) of the National Bank Act.

III

STATUTES INVOLVED IN THIS CASE

1. 12 U.S.C. § 24. Corporate powers of associations. (See Appendix.)

2. California Government Code § 12941. Discrimination on basis of age. (See Appendix.)

IV

STATEMENT OF THE CASE

Appellant, ROBERT G. AALGAARD, was hired by Appellees, MERCHANTS NATIONAL BANK, INC., (hereinafter referred to as "BANK"), on January 9, 1956, at the age of twenty-seven (27). After thirty (30) years of loyal and devoted service during which period he worked his way up from the position of clerk to cashier, along with other titles and responsibilities, he was terminated on November 22, 1985, without prior notice or warning.

On December 22, 1986, Appellant filed a Complaint in the Sacramento County Superior Court naming as defendants, the BANK, its President, THOMAS M. BOLTON, JR., and Executive Vice President, LOUIS FAVRE, alleging causes of action for age discrimination in violation of the California Fair Employment

and Housing Act, and breach of implied Covenant of Good Faith and Fair Dealing.

On November 24, 1986, all three (3) Appellees demurred to the Complaint on the basis of federal pre-emption. Judge Warren overruled the demurrer on December 17, 1986. The Superior Court's decision was upheld by the Court of Appeal.

On July 23, 1987, Appellees moved for a summary judgment on the basis of federal preemption. Judge Warren denied the motion as to the age discrimination claim, and with respect to the wrongful termination claim treated the motion as one for judgment on a pleading, granting it without leave to amend as to the individual defendants and with leave to amend as to the BANK.

On September 8, 1987, Appellant filed an Amended Complaint for Age Discrimination and (solely against the BANK) breach of Implied Covenant of Good Faith and Fair Dealing and breach of an Implied in Fact Covenant Not to Discharge but for Good Cause.

On September 16, 1987, Appellees demurred to the latter two (2) causes of action on the basis of federal pre-emption, and moved to strike the punitive damages allegations on the latter two (2) causes of action. On October 14, 1987, Judge Warren again overruled Appellees' Demurrer and the Motion to Strike was denied.

On November 25, 1987, Appellees again filed a Motion for Summary Judgment on all claims; among the grounds was the hydra of federal pre-emption. On December 27, 1987, Judge Anthony DeCristoforo denied the Motion on procedural grounds. On March 4, 1988, Appellant filed a Second Amended Complaint to add the count of conspiracy to interfere with contractual rights. On September 23, 1988, Appellees again moved for Summary Judgment on all the claims. On November 1, 1988, Judge DeCristoforo granted Appellees' Summary Judgment to each and every Cause of Action.

On May 30, 1989, Appellant appealed the decision of Judge DeCristoforo to the Third District Court of Appeal for the State of California on the ground that the Court committed reversible

error in granting Appellees' Summary Judgment. On October 10, 1990, the Third District Court of Appeal affirmed the Judgment of the Trial Court and held that an action against a national banking association with less than twenty (20) employees and its officers, for age discrimination under the California statute (Government Code § 12941) and for violation of employment covenants under California Law is pre-empted by § 24, Fifth of the National Bank Act.

V

ARGUMENT

A. AN ACTION FOR AGE DISCRIMINATION UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT IS NOT PRE-EMPTED BY § 24 (FIFTH) OF THE NATIONAL BANK ACT.

INTRODUCTION

This case presents a significant issue concerning the coverage of California's age discrimination statute which is of great importance not only to the Appellant, but to the California Fair Employment and Housing Commission and thousands of banking employees throughout California and the nation. This Court is being asked to decide whether an action for age discrimination under the California Fair Employment and Housing Act (hereinafter referred to as "FEHA") is pre-empted by § 24 (Fifth) of the National Bank Act. Because of the broad definition given to the term "officers" under the National Bank Act, a ruling in favor of pre-emption would deprive thousands of California citizens of the protection afforded by California's anti-discrimination and anti-retaliation statute.

Appellant maintains that there is *no* conflict between the National Bank Act and California's anti-discrimination statutes, and that a ruling of pre-emption would both run counter to congressional intent—as manifested in legislation enacted long after the National Bank Act—and would deprive thousands of California's citizens of the protection provided by state law.

The Third District Court of Appeal for the State of California in this case held that national banks doing business in California are exempt from state law prohibiting illegal discrimination in employment practices. According to the Court of Appeal, a national bank is subject to the Federal National Bank Act which authorizes national banks to both hire officers and to "dismiss such officers or any of them at pleasure." As characterized by the Court of Appeal, this "at pleasure" language represents complete federal pre-emption of the employment practices of national banks, to the exclusion of all state statutes prohibiting discrimination on the basis on age, race, sex or other specified status.

In fact, pre-emption has never been a favored doctrine, and the courts have been reluctant to apply it absent a clear showing that such application cannot be avoided. The Appellant shall show that there is *no* conflict between the National Bank Act and California's laws prohibiting unlawful employment practices. Under the rules of pre-emption and the circumstances of this case, this Court must find that compliance with California's anti-discrimination law is not irreconcilable with Appellees' ability to function as a national bank. Appellant will also show that Appellees have failed to demonstrate a basis for the application of pre-emption. What the Court of Appeal's decision does is grant legal immunity from the minimum standards of conduct established by California law, and applicable to all other business employers in that state. Such a grant of immunity cannot be justified under the doctrine of pre-emption, and would constitute an unnecessary and unwise retreat from California's well established public policy of eliminating illegal discrimination and harassment from the work place.

1. The National Bank Act Neither Contains Explicit Pre-emptive Language Nor Otherwise Indicates A Congressional Intent To Usurp The Entire Field Relating To National Banks.

In determining whether a State statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, the Court's sole task is to ascertain the intent of Congress. (See *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95, 77 L.Ed. 2d 490, 103 S.Ct. 2890 (1983); *Malone v. White Motor*

Corporation, 435 U.S. 497, 504, 55 L.Ed. 2d 443, 98 S.Ct. 1185 (1978).) Federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in expressed terms. (*Jones v. Rath Packing Company*, 430 U.S. 519, 525, 51 L.Ed. 2d 604, 97 S.Ct. 1305 (1977).) Second, congressional intent to pre-empt state law in a particular area may be inferred when the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed. 1447 67, S.Ct. 1146 (1947).) Third, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such actual conflict between state and federal law exists when "compliance with both federal and state regulations is a physical impossibility," (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 10 L.Ed. 2d 248, 83 S.Ct. 1210 (1963).), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L.Ed. 581, 61 S.Ct. 399 (1941).) Nevertheless, pre-emption is not to be lightly presumed. (*Maryland v. Louisiana*, 451 U.S. 725, 746, 68 L.Ed. 2d 576, 101 S.Ct. 2114 (1981).)

These pre-emption principles are no less applicable in the field of national banks. Section 24 (Fifth) of the National Bank Act, the provision involved in this case, neither contains explicit pre-emptive language nor otherwise indicates a congressional intent to usurp the entire field relating to national banks. This Court "has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks functions." (*Anderson National Bank v. Luckett*, 321 U.S. 233, 248, 88 L.Ed. 692, (1943)).

Normally, federal legislation does not pre-empt a field traditionally within a state's police powers, unless that is the clear and manifest purpose of Congress. (*Rice, supra,* at 230.)

In the area of banking, regulation has traditionally been one of duel control by both Congress and the states since the passage of the National Bank Act. Although the commerce clause gives Congress the potential power to regulate national banks to the exclusion of all state control, Congress has generally permitted both state and federal regulation, and it has usually been left to the courts to delineate the proper boundaries of state and federal supervision. "The judicial test has been a tolerant one." (*National State Bank, Elizabeth, N.J. v. Long,* 630 F.2d 981, 985 (1980).)

Thus, in *McClellan v. Chipman,* 164 U.S. 347, at 356 (1896) this court held that national banks "... are governed in the daily course of business far more by the laws of the state than of the nation."

Only when state legislation "conflicts with the laws of the United States and either frustrates the purpose of the national legislation or impairs the efficiencies of these agencies of the federal government to discharge the duties for the performance of which they were created..." must it be pre-empted. (*Davis v. Elmira Savings Bank,* 161 U.S. 275, 283 (1896).)

In the area of traditional state police powers and their exercise, both Congress and the courts have been careful to avoid pre-emption whenever possible. For example, in *De Canas, et al v. Bica, et all.,* 424 U.S. 351 (1975), this Court considered and rejected a challenge to California Labor Code Section 2805(a), which prohibited employers in California from knowingly employing illegal aliens if such employment would have an adverse effect on lawful resident workers.

Although this Court recognized that "power to regulate immigration is unquestionable exclusively a federal power," it held however, that California's law was not pre-empted, stating in relevant part:

> "In this case, we cannot conclude that pre-emption is required either because 'the nature of the ... subject matter [regulation of employment of illegal aliens] permits no other conclusion,' or because 'Congress has unmistakenly so ordained' that result."

> "*States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.* Child Labor laws, minimum and other wages laws, laws affecting occupational health and safety, and workmens compensation laws are only a few examples. California's attempt in § 2805(a) to prohibit the knowing employment by California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainsteam of such police power regulation. . ." (Emphasis added, at page 356.)

The Court went on to state:

> "Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation. But *we will not presume* that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by § 2805(a) in a manner consistent with pertinent federal laws. *Only a demonstration that complete ouster of state law—including state power to promogate laws not in conflict with federal laws—was "the clear and manifest purpose of Congress" ' would justify that conclusion. Florida Lime & Avocado Growers v. Paul, supra,* at 146, quoting *Rice v. Santa Fe Elevator Corporation,* 331 U.S. 218, 230 (1947). (Emphasis added at pp. 357-358.)

Absent an intent to preclude even harmonious state regulation, the final test to be applied, according to this Court, is whether the state law in question ". . . 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' . . ." enacting the federal legislation involved. (*De Canas* at 363, quoting *Florida Lime & Avocado Growers v. Paul,* 373 U.S., at 141.)

Given the above tests and the judicial history of the National Bank Act, this Court can only conclude that the Act is not a comprehensive statutory scheme occupying the entire field relating to national banks. Consequently, there is no convincing reason why this Court should set aside the general presumption against pre-emption of state police regulations.

2. The California Fair Employment and Housing Act Does Not Conflict With Federal Law.

Absent expressed language or implied congressional intent to occupy the field, state law may be displaced only to the extent that it actually conflicts with federal law. (*Brown v. Hotel Employees*, 468 U.S. 491, 501, 82 L.Ed. 2d 373, 104 S.Ct. 3179 (1984).) Such actual conflict between state and federal law exists only when "compliance with both federal and state law regulations in a physical impossibility," *Florida Lime & Avocado Growers, Inc., supra,* at 142-143, or when state law "stands as an obstacle to the full purpose and objectives of Congress." *Hines, supra* at 67.

Section 24 (Fifth) of the National Bank Act provides that a National Banking Association will have the power "[t]o elect or appoint directors, and by its Board of Directors to appoint a president or vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places." (12 U.S.C. § 24 (Fifth).)

Section 24 (Fifth) has been consistently interpreted to mean that the Board of Directors of a national bank may dismiss an officer without liability for the breach of the agreement to employ. (See, e.g., *Rankin v. Tygar*, 190 F. 795, 798-99 (8th Cir. 1912); *Kozlowsky v. West Minster National Bank*, 6 Cal. App. 3d 593, 596-97, 86 Cal. Rptr. 52, 54 (1970); *Copeland v. Melrose National Bank of New York*, 229 A.D. 311, 312, 241 N.Y.S. 429, 430 (App.Div.), Aff'd, 245 N.Y. 632, 173 N.E. 898 (1930); *Van Slyke v. Metropolitan National Bank*, 155 Minn. 319, 193 N.W. 470, 471 (1923).) Furthermore, the courts have held that an agreement which attempts to circumvent the complete discretion of a national bank's Board of Directors to terminate an officer at will is void as against public policy. (*McGeehan v. Bank of N.H.*, 123 N.H. 83, 455 A.2d 1055, 1055 (1983); *Kemper v. First National Bank in Newton*, 94 Ill. App. 3d 169, 49 Ill. Dec. 799, 801, 418 N.E. 2d 819, 821 (1981); *Copeland, Id.* at 312.)

In contrast, the California Fair Employment and Housing Act provides in relevant part that "[i]t is an unlawful employment

practice for an employer . . . to discharge, dismiss, reduce, suspend, or demote, any individual over the age of forty on the ground of age, except in cases where the law compels and provides for such action. (Government Code § 12941 (a).) Therefore, the question to be resolved by this Court is whether the California age discrimination statute conflicts with § 24 (Fifth) of the National Bank Act.

The Court of Appeal in this case stated that a "long line of cases supports the proposition that employment rights of officers of national banking association which conflict with the right of Board of Directors to dismiss them at pleasure are pre-empted by § 24 (Fifth) whether those rights arise by virtue of an agreement or are imposed by state law, and whether framed as contractual or tortious causes of action." (*Aalgaard v. Merchants National Bank* (1990) 224 Cal. App. 3d 674, 692.) The Court of Appeal then held that "[f]or the same reasons, we conclude that the age discrimination cause of action is also pre-empted by Section 24 (Fifth)." (*Aalgaard, Id.* at 692.) The Court of Appeal's holding is erroneous and ignores the fact that California's age discrimination cause of action is *statutory* and obtains its authority from a federal statute. The Court also failed to consider *all* of California Government Code § 12941 with sufficient care.

The Court of Appeal initially noted that § 24 (Fifth) empowers the board of directors of a national bank to "dismiss [designated] officers or any of them at pleasure. . ." while California Government Codes Section 12941 makes it an ". . . unlawful employment practice for an employer . . . to discharge, dismiss, reduce, suspend, or demote, any individual over the age of forty (40) on the grounds of age except in cases where the law compels or provides for such action. . ." (Aalgaard, at 7633.) Thus, the Court concluded that the federal and state provisions were in conflict, and that the former therefore pre-empted the latter.

However, in addition to the portion of that provision cited in the Court's opinion, § 12941(a) goes on to state in relevant part: "This section shall not be construed to make unlawful the rejection or termination of employment *where the individual applicant or employee failed to meet bonafide requirements for the job or position sought or held*. . . nor shall this section pre-

clude such physical and medical examinations of applicants and employees as an employer may make or have made to determine fitness for the job position sought or held." (Emphasis added.)

Furthermore, subsection (b) of § 12941 states in relevant part: "This section shall not limit the right of an employer . . . to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or persons claiming that the violation occurred."

Section 12941, when read carefully and in its entirety, in no way limits or inhibits a national bank from making *any* personnel decisions regarding its officers, provided only that such decisions are not being made on the basis of age, rather than job performance and the "bonafide requirements for the job." Thus, in any situation where a banks' board of directors might be compelled to fire or demote an employee for reasons genuinely connected to the bank's fiscal integrity or a need to protect public confidence in it, there is not a single word in § 12941—or any other California anti-discrimination statute— that would inhibit or prevent a bank from taking the necessary action.

The second flaw in the Court of Appeal's analysis is its failure to explain why national banks must be allowed to make employment decisions with immunity from state anti-discrimination statutes in order to properly function as national banks. In other words, the Court never explained why "in order to ensure the fiscal integrity of national banks and to instill public confidence in those financial institutions," *Aalgaard* at 7634, national banks must be allowed to discriminate on the basis of age, race, or sex with immunity.

It seems reasonable to ask then, in what way does granting a bank the freedom to discriminate on the basis of age, race, or sex, contribute to its "financial stability and fiscal integrity?" Furthermore, just how does a grant of legal immunity that allows banks to discharge employees for unlawful reasons "instill public confidence in those financial institutions?" Although the term "at pleasure" is indeed very broad, it cannot be read to free banks from the minimum legal standards that apply to everyone else.

The final flaw in the Court of Appeal's decision is its failure to explain why state anti-discrimination statutes constitute an irreconcilable obstacle to a national bank's freedom of action, even while it was concluding, although somewhat reluctantly, that *federal* anti-discrimination statutes do apply to national banks having more then twenty (20) employees (*Aalgaard,* at 7635.)

Congress enacted the Age Discrimination and Employment Act of 1967 (29 USC § 621 et seq., hereinafter referred to as "ADEA") banning age discrimination by employers employing more than twenty (20) person in industries affecting commerce. (29 USC § 623, 630, subdivisions (a) and (b).) The ADEA provides no exception for National Banks (or any other former federally chartered financial institution) and since it was enacted long after the National Bank Act, under "familiarly statutory interpretation, when their is such a conflict, the most recent and more specific congressional pronouncement will prevail over a prior, more generalized statue." (*National Resources Defense Council v. U.S.E.P.A.*, 824 F.2d 1258, 1278 (1987); *Morton v. Mancari* 417 U.S. 535, 550 41 L.Ed. 2d 290, 94 S.Ct. 2474 (1974).)

Even the Court of Appeal agreed that "[b]y implication, Congress arguably has decreed that national banks with twenty (20) or more employees are bound by the federal age discrimination statute." (*Aalgaard, Id.* at 694.) However, the Court of Appeal erred when it held that "[b]ut as to national banks with less than twenty (20) employees, the National Bank Act and the federal discrimination statute are not irreconcilable. Thus, a repeal by implication cannot be asserted as to exempted small national banks because there is no conflict as to them between § 24, Fifth of the National Bank Act and the federal Age Discrimination and Employment Act. As to those small national banks, the board of directors still retain the power to dismiss their officers "at pleasure" without regard to age, a power conferred by a federal statute which has never been repealed. Consequently, the extant federal statute prevails and a conflicting state statute cannot be applied to small national banks having less than twenty (20) employees." (*Aalgaard, supra* at 694.) The Court of Appeal's conclusion is contrary to congressional intent.

A careful review of the ADEA reveals that Congress *expressly* anticipated and encouraged state regulations regarding age discrimination. 29 USC § 633 (a) specifically states that the federal law will not affect the jurisdiction of state agencies performing "like functions," and 29 USC § 633 (b) gives state proceedings certain priorities over federal actions in this area.

Numerous state and federal courts have held that state age discrimination statutes are *not* pre-empted by the ADEA. (See, *Simpson v. Alaska State Commission For Human Rights* 608 F.2d 1171 (1979) [ADEA does not pre-empt state age discrimination statue which contains no age limitation]; *Hillman v. Consumers Power Company* 282 N.W. 2d 422 (1979) [ADEA does not pre-empt state age discrimination statute which provides greater remedies]; *Fisher v. Ouaker Oats Company* 559 A. 2d 1 (1989) [ADEA does not pre-empt state age discrimination statute which provides a longer statute of limitations]; *Maine Human Rights Commission v. Kennebec Water Power Company* 468 A. 2d 307 (1983) [ADEA does not pre-empt state age discrimination statute which contains no age limitation]; *Adams v. Leatherbury* 88 So. 2d 510 (1980) [ADEA does not pre-empt state age discrimination statute as it applies to pilots working on enrolled vessels]; *Bailey v. Container Corporation of America* 590 F.Supp. 629 (1984) [ADEA does not pre-empt state age discrimination statute]; *Mason v. Midwestern Fidelity Corporation* 589 F.Supp. 751 (1984) [ADEA does not pre-empt state age discrimination statute which permits compensatory and punitive damages]; *Chmiel v. Beverly Wilshire Hotel* 873 F. 2d 1283 (1989) [ADEA does not pre-empt state age discrimination statute].)

In addition, the Federal Bankruptcy Court for the Northern District of Ohio recently held that Section 24 (Fifth) does *not* pre-empt Section 525 (b) of the Bankruptcy Code which prohibits employment discrimination based on an employee filing bankruptcy. (*In Re Sweeney* 113 B.R. 359, 364 (1990).) The Court in *Sweeney* stated that § 24 (Fifth) of the National Bank Act must be construed and harmonized with the dictates of the more recent ADEA which precludes discrimination. (*Sweeney, Id.* at 364)

Therefore, there is no logic whatsoever to the argument the state laws prohibiting discrimination are irreconcilable with the National Bank Act, and thus must be pre-empted even as very similar federal laws on the same subject continue to apply.

Furthermore, this Court has been very hesitant to deprive states of their ability to retain jurisdiction over employment related matters. (See, *Belknap, Inc. v. Hale* 463 U.S. 491, 77 L.Ed. 2d 798 103 S.Ct. 31 72 (1983) [NLRA does not pre-empt state breach of contract actions by strike replacements]; *Sears, Roebuck and Company v. Carpenters* 436 U.S. 180, 56 L.Ed. 2d 209, 98 S.Ct. 1745 (1978) [NLRA does not pre-empt state trespass action]; *Farmer v. Carpenters* 430 U.S. 290, 51 L.Ed. 2d 338, 97 S.Ct. 1056 (1977) [NLRA does not pre-empt state tort remedies for intentional infliction of emotional stress]; *Linn v. United Plant Guard Workers* 383 U.S. 53, 15 L.Ed. 2d 582, 86 S.Ct. 657 (1966) [NLRA does not pre-empt state defamation action]; *Brown v. Hotel Employees* 468 U.S. 491, 82 L.Ed. 2d 373, 104 S.Ct. 3179 (1984) [Section 7 of NLRA does not pre-empt New Jersey Casino Control Act].)

While the "at pleasure" language of Section 24 (Fifth) is indeed quite broad, and clearly intended to give banks wide latitude in removing individuals who might harm their operations or undermine public confidence and their integrity, that "at pleasure" language simply cannot be stretched to protect illegal conduct.

In fact, California's anti-discrimination law in no way conflicts with or frustrates institutions governed by the National Bank Act. Federal anti-discrimination statutes already prohibit the same illegal conduct barred by the California Fair Employment and Housing Act. The Court of Appeal concedes that national banks are subject to the federal ADEA. The Court of Appeal must also concede that jurisdiction of Title VII of the Civil Rights Act of 1954 (42 U.S.C. Section 2000 et. seq.) which, like the California law, prohibits employment discrimination on a bases of "race, color, religion, sex, or national origin." Moreover, any such actions against national banks, even if based on federal law, can be brought in either federal or state courts. (*Yellow Freight System, Inc. v. Donnelly* (1990) 110 S.Ct. 1566.)

Since it is true, therefore, that a national bank can be sued in either federal or state court under federal anti-discrimination law, then what is there about virtually identical *state* statues that make them irreconcilable with doing business under the National Bank Act? Being unable to answer this privotal question, the Court of Appeal's attempt to secure immunity from state discrimination law for national banks must fail, and the normal presumptions favoring the validity and application of state and police statutes must govern.

VI

CONCLUSION

California has a strong and clearly stated public policy against illegal discrimination in employment. This public policy is set forth in both the statues and case law. The legislature clearly wanted this public policy to be given the greatest possible latitude in any judicial review of actions brought pursuant to the FEHA.

The most important and critical error in the Court of Appeal's decision is its refusal to recognize this strong public policy in both state and federal law against discrimination in employment. In seeking to justify total freedom from all state law constraints under the "at pleasure" language of Section 24 (Fifth), the Court of Appeal attempts to ignore a substantial body of state and federal law upholding the basic principal that the power to hire and fire has clear legal limits. Those limits do not permit the exercise of the power to hire and fire for unlawful reasons, even when justified by a claimed need "to ensure the fiscal integrity of national banks and to instill public confidence in those financial institutions." (*Aalgaard, supra,* at 7634.)

In the guise of serving one public policy—a need for sound and efficient national banks—the Court of Appeal attempts to ignore the far more important and pervasive public policy against unlawful discrimination. The Court of Appeal's attempt to turn the language of Section 24 (Fifth) into a grant of legal immunity from state law cannot be allowed to succeed.

Although the "at pleasure" language of Section 24 (Fifth) gives banks very broad powers, those powers are not unlimited. Section 24 (Fifth) can be read to give banks the considerable freedom to discharge officers for good reasons, bad reasons, or no reasons at all, but it cannot be read to authorize discharges that are unlawful, in that they are discriminatory and therefore violate public policy and state law.

If the Court of Appeal's decision in this case is allowed to stand, and Section 24 (Fifth) is held to pre-empt state age discrimination statutes, national banks would be free to operate immune from state employment laws, all in the name of the "at pleasure" language of Section 24 (Fifth). Literally thousands of bank "officers" throughout this country could be terminated based solely on their age. As explained by former California Supreme Court Justice, Marcus Kaufman, eliminating whole classes of legitimate litigation from the court system is "short-sided and inappropriate . . . the whole purpose of a judicial system is to provide a mechanism for the peaceful resolution of genuine disputes and redress legitimate grievances." (See Kaufman, *Crisis in the Court,* 10 Cal. Lawyer 28, August, 1990.)

In conclusion, California, like the majority of states have a strong public policy favoring equal treatment in employment. That policy, as set forth in the FEHA, in no way conflicts with federal law or Section 24 (Fifth) of the National Bank Act. For that reason, application of the doctrine of pre-emption is neither justified nor required. Therefore, Appellant respectfully requests, that this Court grant Appellant's Writ of Certiorari.

Dated:

MASTAGNI, HOLSTEDT & CHIURAZZI

Richard J. Chiurazzi
Attorney for Appellant

APPENDIX

III

STATUTES INVOLVED IN THIS CASE

1. 12 U.S.C. § 24. Corporate powers of associations. (See Appendix.)

Upon duly making and filing articles of association and an organization certificate the [a national banking] association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

First. To adopt and use a corporate seal.

Second. To have succession from the date of the approval of this Act [enacted Feb. 25, 1927], or from the date of its organization if organized after such date of approval until such time as it be dissolved by the act of its shareholders owning two-thirds of its stock, or until its franchise becomes forfeited by reason of violation of law, or until terminated by either a general or a special Act of Congress or until its affairs be placed in the hands of a receiver and finally wound up by him.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers

as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: Provided, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on the date of the enactment of the Banking Act of 1935 [enacted Aug. 23, 1935]. As used in this section the term "investment securities" shall mean marketable obligations, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may be regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof, or obligations of the Washington Metropolitan Area Transit Authority which are guaranteed by the Secretary of Transportation under section 9 of the National Capital Transportation Act of 1969 [D.C. Code], or obligations issued under authority of the Federal Farm Loan Act, as

amended, or issued by the thirteen banks for cooperatives or any of them or the Federal Home Loan Banks, or obligations which are insured by the Secretary of Housing and Urban Development under title XI of the National Housing Act [12 USC §§ 1749aaa et seq.] or obligations which are insured by the Secretary of Housing and Urban Development (hereafter in this sentence referred to as the "Secretary") pursuant to section 207 of the National Housing Act [12 USC § 1713], if the debentures to be issued in payment of such insured obligations are guaranteed as to principal and interest by the United States, or obligations, participation, or other instruments of or issued by the Federal National Mortgage Association or the Government National Mortgage Association, or mortgages, obligations, or other securities which are or ever have been sold by the Federal Home Loan Mortgage Corporation pursuant to section 305 or section 306 of the Federal Home Loan Mortgage Corporation Act [12 USC § 1454 or § 1455], or obligations of the Federal Financing Bank or obligations or other instruments, or securities of the Student Loan Marketing Association, or obligations of the Environmental Financing Authority, or such obligations of any local public agency (as defined in section 110(h) of the Housing Act of 1949 [42 USC § 1460(h)]) as are secured by an agreement between the local public agency and the Secretary in which the local public agency agrees to borrow from said Secretary, and said Secretary agrees to lend to said local public agency, monies in an aggregate amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice to pay, when due, the interest on and all installments (including the final installment) of the principal of such obligations, which monies under the terms of said agreement are required to be used for such payments, or such obligations of a public housing agency (as defined in the United States Housing Act of 1937, as amended [42 USC §§ 1401 et seq.]) as are secured (1) by an agreement between the public housing agency and the Secretary in which the public housing agency agrees to borrow from the Secretary, and the Secretary agrees to lend to the public housing agency, prior to the maturity of such obligations, monies in an amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice

to pay the principal of such obligations with interest to maturity thereon, which monies under the terms of said agreement are required to be used for the purpose of paying the principal of and the interest on such obligations at their maturity, (2) by a pledge of annual contributions under an annual contributions contract between such public housing agency and the Secretary if such contract shall contain the covenant by the Secretary which is authorized by subsection (b) of section 22 [section 6(g) (42 USC § 1437d(g))] of the United States Housing Act of 1937, as amended, and if the maximum sum and the maximum period specified in such contract pursuant to said subsection 22(b) shall not be less than the annual amount and the period for payment which are requisite to provide for the payment when due of all installments of principal and interest on such obligations, or (3) by a pledge of both annual contributions under an annual contributions contract containing the covenant by the Secretary which is authorized by section 6(g) of the United States Housing Act of 1937 [42 USC § 1437d(g)], and a loan under an agreement between the local public housing agency and the Secretary in which the public housing agency agrees to borrow from the Secretary, and the Secretary agrees to lend the public housing agency, prior to the maturity of the obligations involved, moneys in an amount which (together with any other moneys irrevocably committed under the annual contributions contract to the payment of principal and interest on such obligations) will suffice to provide for the payment when due of all installments of principal and interest on such obligations, which moneys under the terms of the agreement are required to be used for the purpose of paying the principal and interest on such obligations at their maturity: Provided, That in carrying on the business commonly known as the safedeposit business the association shall not invest in the capital stock of a corporation organized under the law of any State to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus. The limitations and restrictions herein contained as to dealing in and underwriting investment securities shall not apply to obligations issued by the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Devel-

opment Bank, the African Development Bank, or the Inter-American Investment Corporation, or obligations issued by any State or political subdivision or any agency of a State or political subdivision for housing, university, or dormitory purposes, which are at the time eligible for purchase by a national bank for its own account, nor to bonds, notes or other obligations issued by the Tennessee Valley Authority or by the United States Postal Service: Provided, That no associations shall hold obligations issued by any of said organizations as a result of underwriting, dealing, or purchasing for its own account (and for this purpose obligations as to which it is under commitment shall be deemed to be held by it) in a total amount exceeding at any one time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund. Notwithstanding any other provision in this paragraph, the association may purchase for its own account shares of stock issued by a corporation authorized to be created pursuant to title IX of the Housing and Urban Development Act of 1968 [42 USC §§ 3931 et seq.], and may make investments in partnership, limited partnership, or joint venture formed pursuant to section 907(a) or 907(c) of that Act [42 USC § 3937(a) or (c)]. Notwithstanding any other provision of this paragraph, the association may purchase for its own account shares of stock issued by any State housing corporation incorporated in the State in which the association is located and may make investments in loans and commitments for loans to any such corporation: Provided, That in no event shall the total amount of such stock held for its own account and such investments in loans and commitments made by the association exceed at any time 5 per centum of its capital stock actually paid in and unimpaired plus 5 per centum of its unimpaired surplus fund. Notwithstanding any other provision in this paragraph, the association may purchase for its own account shares of stock issued by a corporation organized solely for the purpose of making loans to farmers and ranchers for agricultural purposes, including the breeding, raising, fattening, or marketing of livestock. However, unless the association owns at least 80 per centum of the stock of such agricultural credit corporation the amount invested by the association at any one time in the stock of such corporation shall not exceed 20 per centum of the unimpaired capital and surplus of

the association: Provided further, That notwithstanding any other provision of this paragraph, the association may purchase for its own account shares of stock of a bank insured by the Federal Deposit Insurance Corporation or a holding company which owns or controls such an insured bank if the stock of such bank or company is owned exclusively (except to the extent directors' qualifying shares are required by law) by depository institutions and such bank or company and all subsidiaries thereof are engaged exclusively in providing services for other depository institutions and their officers, directors, and employees, but in no event shall the total amount of such stock held by the association in any bank or holding company exceed at any time 10 per centum of the associations capital stock and paid in and unimpaired surplus and in no event shall the purchase of such stock result in an association's acquiring more than 5 per centum of any class of voting securities of such bank or company. The limitations and restrictions contained in this paragraph as to an association purchasing for its own account investment securities shall not apply to securities that (A) are offered and sold pursuant to section 4(5) of the Securities Act of 1933 (15 U.S.C. 77d(5)); or (B) are mortgage related securities (as that term is defined in section 3(a)(41) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(41)), subject to such regulations as the Comptroller of the Currency may prescribe, including regulations prescribing minimum size of the issue (at the time of initial distribution) or minimum aggregate sales prices, or both.

A national banking association may deal in, underwrite, and purchase for such association's own account qualified Canadian government obligations to the same extent that such association may deal in, underwrite, and purchase for such association's own account obligations of the United States or general obligations of any State or of any political subdivision thereof. For purposes of this paragraph—

> (1) the term "qualified Canadian government obligations" means any debt obligation which is backed by Canada, any Province of Canada, or any political subdivision of any such Province to a degree which is comparable to the liability of the United States, any State, or any political subdivision

thereof for any obligation which is backed by the full faith and credit of the United States, such State, or such political subdivision, and such term includes any debt obligation of any agent of Canada or any such Province or any political subdivision of such Province if—

(A) the obligation of the agent is assumed in such agent's capacity as agent for Canada or such Province or such political subdivision; and (B) Canada, such Province, or such political subdivision on whose behalf such agent is acting with respect to such obligation is ultimately and unconditionally liable for such obligation; and

(2) the term "Province of Canada" means a Province of Canada and includes the Yukon Territory and the Northwest Territories and their successors.

Eighth. To contribute to community funds, or to charitable, philanthropic, or benevolent instrumentalities conductive to public welfare, such sums as its board of directors may deem expedient and in the interests of the association, if it is located in a State the laws of which do not expressly prohibit State banking institutions from contributing to such funds or instrumentalities.

Ninth. To issue and sell securities which are guaranteed pursuant to section 306(g) of the National Housing Act [12 USC § 1721(g)].

Tenth. To invest in tangible personal property, including, without limitation, vehicles, manufactured homes, machinery, equipment, or furniture, for lease financing transactions on a net lease basis, but such investment may not exceed 10 percent of the assets of the association.

(As amended Mar. 31, 1980, P.L. 96-221, Title VII, Part A, § 711, 94 Stat. 189 Aug. 13, 1981, P.L. 97-35, Title XIII, Subtitle B, Part 3, § 1342(a), 95 Stat. 743; Oct. 15, 1982, P.L. 97-320, Title IV, Par A, § 404(b), 96 Stat. 1511; Jan. 12, 1983, P.L. 97-457, § 18, 96 Stat. 2509; Oct. 3, 1984, P.L. 98-440, Title I, § 105(c), 98 Stat. 1691; S. No. 2416, Title II, § 211(a), incorporated in Act Oct. 12, 1984, P.L. 98-473, Title I, § 101(1) in part,

98 Stat. 1385; Aug. 10, 1987, P.L. 100-86, Title I, § 108, 101 Stat. 579; Sept. 28, 1988, P.L. 100-449, Title III, § 308, 102 Stat. 1877.)

2. California Government Code § 12941. Discrimination on basis of age.

(a) It is unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action. This section shall not be construed to make unlawful the rejection or termination of employment where the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held, or to require any changes in any bona fide retirement or pension programs or existing collective-bargaining agreements during the life of the contract, or until January 1, 1980, whichever occurs first, nor shall this section preclude such physical and medical examinations of applicants and employees as an employer may make or have made to determine fitness for the job or position sought or held.

Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, and trade schools shall not, in and of themselves, constitute a violation of this section.

(b) This section shall not limit the right of an employer, employment agency, or labor union to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or persons claiming the violation occurred.

Added stats 1980 ch 992 § 4; Amended Stats 1981 ch 625 § 3.

Exhibit A

Certified For Publication*

In the Court of Appeal of the
State of California

Third Appellate District
(Sacramento)

Robert G. Aalgaard,
Plaintiff and Appellant,

v.

Merchants National Bank, Inc., et al.,
Defendants and Respondents.

C005605
(Super. Ct. No. 343504)

[Filed October 10, 1990]

APPEAL from a judgment of the Superior Court of Sacramento County, Anthony De Cristoforo, Jr., Judge. Affirmed.

Mastagni, Holstedt & Chiurazzi and Richard J. Chiurazzi for Plaintiff and Appellant.

Hubbert, Shanley & Lee and N. Paul Shanley for Defendants and Respondents.

The central question in this appeal is whether an action against a national banking association with less than 20 employees, and its officers, for age discrimination under the California statute (Gov. Code, § 12941) and for violation of employment covenants under California law is pre-empted by section 24, fifth, of the National Bank Act. (12 U.S.C. § 24, Fifth [§ 24, Fifth].) We hold that it is.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV.

Under the act, "a national banking association . . . shall have power . . . [¶] To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, . . . dismiss such officers or any of them at pleasure, and appoint others to fill their places." (§ 24 (Fifth.) Under the California statute, however, an employer may not "discharge [or] dismiss . . . any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action." (Gov. Code, § 12941, subd. (a).) In addition, under California decisional law, an employer's breach of the implied covenant of good faith and fair dealing gives rise to a cause of action for breach of contract. (Newman v. Emerson Radio Corp. (1989) 48 Cal.3d 973; Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654.) Similarly, an employer's breach of an implied contract not to discharge except for good cause also gives rise to a cause of action for breach of contract. (Koehrer v. Superior Court (1986) 181 Cal.App.3d 1155; Pugh v. See's Candies, Inc. (1981) 116 Cal.App.3d 311.) The issue is whether these state-based causes of action are pre-empted by the federal statute.

Following his separation from employment as the cashier of defendant Merchants National Bank, Inc. (Bank), plaintiff Robert G. Aalgaard brought this action against the Bank and two of its officers. By the time of his second amended complaint the action had evolved into one for a violation of the state age discrimination statute (Gov. Code, § 12941), a tortious breach of the covenant of good faith and fair dealing implied in his employment contract with the Bank,[1] a breach of an implied covenant to discharge him only for good cause, and a conspiracy to interfere with his contractual relationship with defendant Bank. The corpo-

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[1] Following the decisions in *Foley* and *Newman*, a breach of this covenant is actionable only in contract in the employment context. We will assume for sake of argument that the plaintiff has sufficiently alleged a contractual claim on this cause of action. For convenience, we shall refer to this as a "*Foley* covenant."

rate and individual defendants[2] repeatedly and unsuccessfully asserted below that all four causes of action were pre-empted by § 24 (Fifth). They further contended that there was no triable controversy concerning the fact that they did not breach any covenant of good faith or fair dealing, that there was no implied covenant not to discharge except for good cause, that the individual defendants did not participate in any conspiracy and in any event were protected by the manager's privilege, that there was no outrageous conduct warranting the award of punitive damages, and that plaintiff could not recover any mental suffering because of the exclusionary provisions of the Workers' Compensation Act. Following a third summary judgment motion incorporating these arguments yet one more time, the trial court granted the motion without specifying the basis in its order. From the transcript of the hearing on the motion, however, it is clear the court based its ruling solely on the pre-emption issue. The trial judge stated, "I do think the Federal Statute is specific. And I think it fits right here. And I think the Board can terminate at it[s] pleasure. And that's what they did. . . . So for that reason, I'm going to go ahead and grant the summary judgments."

The plaintiff's appeal challenges all the bases of the defendants' motion. We first conclude that the cause of action for conspiracy to interfere with plaintiff's contractual relationship with the Bank is barred by the manager's privilege. The remaining three causes of action, we next conclude, are pre-empted by § 24 (Fifth). Accordingly, we reject plaintiff's challenges and affirm the judgment.

I

PROCEDURAL HISTORY OF PLAINTIFF'S ACTION

Plaintiff's initial complaint, which contained causes of action only for age discrimination and breach of the *Foley* covenant, was filed in September 1986. The defendant demurred to it in Novem-

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[2] The individual defendants are Thomas M. Bolton, Jr., the Bank's president and a member of its board of directors, and Louis Favre, the Bank's executive vice-president.

ber 1986 on the basis of federal pre-emption. Judge Warren overruled the demurrer in December 1986. The defendants then moved for summary judgment on this basis in August 1987. Judge Warren denied the motion as to the age discrimination claim, and—with respect to the *Foley* claim—treated the motion as one for judgment on the pleadings, granting it without leave to amend as to the individual defendants and with leave to amend as to the Bank. The plaintiff next filed an amended complaint for age discrimination and (solely against, the Bank) breach of the *Foley* and *Pugh* covenants. The Bank (and, unaccountably, the individual defendants who were not part of the claims) demurred in October 1987 to the two latter causes of action on the basis of pre-emption. Judge Warren again overruled. Undaunted, the defendants moved for summary judgment in January 1988 on all claims; among the grounds was the hydra of pre-emption. Judge Anthony DeCristoforo denied the motion on procedural grounds. The plaintiff filed a second amended complaint in March 1988 to add the count for conspiracy to interfere with contractual rights. The defendants brought the successful summary judgment motion (styling it as a renewed motion) before Judge DeCristoforo in November 1988. This appeal followed.

II

THE SCOPE OF REVIEW ON APPEAL FROM THIS MOTION

"Since a summary judgment motion raises only questions of law regarding the construction and effect of the supporting and opposing papers, we independently review them on appeal, applying the same three-step analysis required of the trial court .... First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponents's pleading .... [¶] [Second], we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in [the] movant's favor .... [¶] When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the

opposition demonstrates the existence of a triable, material factual issue." (AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal.App.3d 1061, 1064-1065 [citations omitted].)

As we shall ultimately demonstrate, there are few material factual issues relevant to the questions of law raised in this appeal. But to be orderly, we shall follow the *AARTS* paradigm.

III

THE COMPLAINT AND THE SUMMARY JUDGMENT PAPERS

A.

For purposes of his age discrimination cause of action, plaintiff alleged that he was first hired by the Bank in January 1956. By 1978, he had become a full cashier and began attending meetings of the Bank's board of directors as an officer of the Bank (acting at the meetings in the capacity of secretary). Plaintiff alleged his competence at his job (as evidenced by his steadily increasing responsibilities over the course of three decades) and his belief that beginning in 1984 "most of [his] duties and responsibilities were gradually taken away from him and given to other younger individuals." By November 22, 1985, plaintiff had attained the age of 57 and intended to work with the Bank for a minimum of eight additional years. But on that date, defendants Bolton and Favre told the plaintiff the board had decided he should take an early retirement; defendant Bolton demanded the plaintiff draft a letter making such a request. The plaintiff cleared out his desk and left without drawing up the letter. He returned on December 4th with the requested letter,[3] and was given written confirmation, dated November 22, of "the Board of Directors[']s action in connection with your request for early retirement." The wrongful acts of defendants "were oppressive and were done maliciously

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[3] In that letter, plaintiff wrote: "I hereby request early retirement effective Dec. 31, 1985 under the terms and conditions stated below." Those conditions related to payment of pension funds, salary, insurance premium and the additional payment "on Jan. 2, 1986 [of] $25,000.00 plus end of the year bonus of one month[']s pay, $3800.00."

with an intention and design of discriminating against Plaintiff based upon his age." Plaintiff further alleged that he had filed a complaint with the California Department of Fair Employment and Housing in June 1985 and received a right-to-sue letter in July 1986. On this cause of action, plaintiff sought the imposition of liability upon both the corporate and individual defendants.

For purposes of his *Foley* cause of action against the Bank, he alleged he was the third most highly paid employee of the Bank. Had he continued working until normal retirement, it would have been at a substantial cost to the Bank. Therefore, without good cause, the Bank began to reassign his duties in order to humiliate him into resigning. At a board meeting on November 21 of which the plaintiff was not informed, the individual defendants falsely represented to the other board members that the plaintiff's performance for the prior three years had been inadequate; the other board members had no way of knowing these representations were false. This course of conduct was alleged to be a breach of the covenant of good faith and fair dealing.

For the purpose of the *Pugh* claim against the Bank, he alleged that a covenant was in fact implied limiting the Bank's right to terminate him except for good cause. As a result, he had a reasonable expectation of continued employment based on his 30 years of employment, his receipt of only minor criticism throughout this time, his continually increasing salary, and his observation of the Bank's practice of not terminating people except after progressive discipline and for good cause. Plaintiff's termination and the Bank's mendacious insistence that it indeed had good cause for terminating him amounted to a breach of implied in fact covenant.

In his fourth cause of action against the individual defendants, he alleged they conspired to interfere with his business relationship with the Bank. The course of conduct previously described was the wrongful way in which they accomplished this.

Although plaintiff alleged defendant Bank "was a California corporation duly organized and existing under the laws of the State of California," the documents in support of the summary judgment motion revealed a certificate of authority had been

issued by the United States Comptroller of the Currency to Merchants National Bank of Sacramento. Based upon that showing, plaintiff ultimately conceded it was undisputed that the Bank was a chartered national bank.

In support of their motion for summary judgment, defendants declared, among other things, that at the board meeting on November 21, 1985, "the Board of Directors unanimously agreed that due to the Plaintiff['s] . . . poor performance over the last three (3) years and lack of initiative, he be offered a chance to retire early or be terminated." In opposition to defendants' summary judgment motion, plaintiff reasserted the factual claims set forth in his complaint and then embellished them. As a result plaintiff claims that his declaration raises a triable issue as to whether it was the individual defendants and not the board of directors as a whole who either terminated him or at least constructively terminated him.

B.

As we have noted, the defendants adhered to the dramatic convention of thrice taking an action—moving for summary judgment—before achieving success. The three motions are essentially echoes of one another. Judge DeCristoforo had found the second to be no more than a renewal of the first and denied it for failure to comply with the statutory requirement of an affidavit. (Code Civ. Proc., § 1008, subd. (b).) The third motion formally complied with the statute by including counsel's allegation that declarations of the board directors (stating it was the action of the board which had terminated the plaintiff) were new and previously unavailable evidence which were now included in the third (and second) motion but not the first. The third motion, in point of fact, relied on the papers filed for the second motion. The plaintiff similarly incorporated in the third motion his previous filings and objections.

In this sea of paper, only the following evidence is relevant. For purposes of the summary judgment motion, it is sufficient to note the board minutes and declarations of the directors establish it was they who ultimately offered the plaintiff the claimed Hob-

son's choice of termination or forced retirement.[4] For purposes of the pre-emption question and the resolution of the interference with contract cause of action, it suffices to note the defendants produced declarations that they had valid reasons for retiring the plaintiff, countered by the plaintiff's declarations setting forth facts from which it might be inferred these reasons had no basis in truth. At this stage of the proceedings, the defendants are not even concerned with whether they had good cause to discharge him, denoting the question "irrelevant" for purposes of their summary judgment motion.

DISCUSSION

IV

THE DOCTRINE OF LAW OF THE CASE IS NOT RELEVANT.

The plaintiff asserts dehors the record that the defendants challenged the denial of their initial demurrer by a writ in this court. He claims this court's denial of relief constitutes law of the case that his age discrimination claim may proceed.

The defendants counter only with the statement that demurrers and summary judgments are different. We judicially notice the existence of Merchants National Bank v. Superior Court (Aalgaard) (January 29, 1987) No. C000980, in which a petition for a writ of prohibition was summarily denied.

Under the venerable doctrine of law of the case, "where, upon an appeal, the [appellate] court, in deciding the appeal, *states in its opinion* a principle or rule of law *necessary to the decision,* that principle or rule becomes the law of the case and must be adhered to throughout its subsequent appeal, . . . and this although in its subsequent consideration [the] court may be clearly of the opinion that the former decision is erroneous in that particular." (Tally v. Ganahl (1907) 151 Cal. 418, 421 [emphasis added].)

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[4] Notwithstanding the plaintiff's arguments that the interpretation of these minutes raises questions of fact, we conclude as a matter of law that they do not.

However, "upon denial of application for an extraordinary writ by the Court of Appeal without issuance of an alternative writ or order to show cause, a mere order without opinion is entered. This kind of summary denial cannot properly be deemed a conclusive decision on the merits because there are many possible grounds for denial other than the merits." (Richer v. Superior Court (1976) 63 Cal.App.3d 748 755-756 [citations and internal quote marks deleted].) Therefore, unless the sole issue in a summary writ proceeding is the appealability of a judgment, law of the case does not apply to intermediate summary denials of writs. (Cf. People v. Medina (1972) 6 Cal.3d 484, 490-493 & fn. 7 [summary denial of suppression motion writ].) As a result, our prior action in this case is of no effect.

V

MANAGER'S PRIVILEGE BARS INTERFERENCE WITH CONTRACT CLAIM.

Because the defendants have advanced no argument regarding the fourth cause of action, we could take this as a waiver. However, since it is our obligation to affirm the decision of the lower court unless we can find no basis for doing so, we address the merits of this claim.

As noted earlier, the fourth cause of action pled a conspiracy by the individual defendants to interfere with the plaintiff's economic relationship with the Bank through a campaign of misrepresentations.[5] "An action in tort will lie for the intentional interference by a third person with a contractual relationship either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification. The tort is a specie of the broader tort of interference with prospective economic advantage[,] involving

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[5] The conspiracy portion of the count is irrelevant for our purposes, because it is the long-standing rule in this state that a conspiracy itself does not give rise to a cause of action unless a civil wrong resulting in damage has been committed. (Herron v. Hughes et als. (1864) 25 Cal. 555, 560. See also 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 45, p. 108 and cases cited there.)

similarity in elementary makeup and conduct while differing only in the existence of legally binding contract. . . . Privilege or justification[6] for the interference is an affirmative defense, not an element of plaintiff's cause of action. . . ." (H & M Associates v. City of El Centro (1980) 109 Cal.App.3d 399, 405 [internal punctuation & citations deleted].)

The defendants' federal pre-emption argument is of no import with respect to this tort, because "even though the relationship is terminable at will, . . . the fact that a contract is at the will of the parties, . . . does not make it one at the will of others. Thus the fact that the Bank was privileged to discharge plaintiff at any time does not necessarily privilege a third party unjustifiably to induce the termination." (Kozlowsky v. Westminster Nat. Bank (1970) 6 Cal.App.3d 593, 598 [internal quotation marks & citation deleted]; Marczak v. Drexel Nat. Bank (1989) 186 Ill.App.3d 640 [542 N.E.2d 787] [interference with contract claim is not inconsistent with employment at will]; EIB v. Federal Reserve Bank of Kansas City (Mo.App. 1982) 633 S.W.2d 432 [breach of contract action pre-empted, but tort of interfering with business relationship may proceed].) If the individual defendants were not acting on behalf of the board in their dealings with plaintiff, then the pre-emptive shelter of § 24 (Fifth) would not protect them. "The federal statute (12 U.S.C. § 24, *supra*) empowers the board of directors, not the shareholders or an individual director, to dismiss an officer." (*Kozlowsky, supra,* 6 Cal.App.3d at p. 600.) Thus, even though the board ultimately terminated plaintiff and hence exempted the Bank from liability under § 12 (Fifth), the evidence is conflicting on whether the individual defendants were acting on behalf of the board when they allegedly interfered with plaintiff's contractual relationship with the Bank. Since the evidence is conflicting on this point, the issue cannot be resolved on pre-emption grounds at this stage of the proceedings. (See

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[6] Modern analysts, following the Restatement Second of Torts, eschew use of either term in order to avoid questions of burden of proof, preferring the phrase "improper interference." The factors in determining whether the interference was improper remain essentially the same as with privilege or justification. (Environmental Planning & Information Council v. Superior Court (1984) 36 Cal.3d 188, 194, fn. 3.)

Mahoney v. Crocker Nat. Bank (N.D.Cal. 1983) 571 F.Supp. 287, 291.)

But that does not end the matter. The defendants also relied below on the so-called "manager's privilege" as to this cause of action. That privilege has been described by one court this way: "The privilege to induce an otherwise apparently tortious breach of contract is extended by law to further certain social interests deemed of sufficient importance to merit protection from liability. Thus, a manager or agent may, with impersonal or disinterested motive, properly endeavor to protect the interests of his principal by counseling the breach of a contract with a third party which he reasonably believes to be harmful to his employer's best interests." (Olivet v. Frischling (1980) 104 Cal.App.3d 831, 840-841, fn. omitted; see also 3 Levy et al, Cal. Torts (1990 ed.) Business Torts, § 40.119[3], pp. 40-165 to 40-166.) Defendants claim this nonstatutory privilege is absolute, entitling them to judgment as a matter of law. The plaintiff argues that the defendants' justification is a question of fact and that triable issues exist with respect to it.

The question of whether the manager's privilege is absolute (and thus requiring the instant individual defendants to show only that they occupied such a position with defendant Bank) or qualified (requiring them to establish their prima facie case entitlement to it) is somewhat muddled in California law. In Boyson v. Thorn (1893) 98 Cal. 578, the Court apparently held that the state of mind of a managerial defendant is irrelevant if the means by which the defendant brought about the breach were lawful. In Imperial Ice Co. v. Rossier (1941) 18 Cal.2d 33, the Court expanded upon the nature of the tort of interference with contractual relations. It held that the tort could be based on breaches induced by unlawful means, or by lawful means without justification.[7] (*Id.* at p. 35.) Justification was said to exist where the person inducing the breach is protecting an interest of greater social value than contractual stability. (*Ibid.*) With respect to the

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[7] The court repudiated cases which had interpreted Boyson as holding that breaches induced by lawful means were never actionable. (Id. at pp. 37-38.)

defendant's state of mind, the court held, "The presence or absence of ill-will . . . is immaterial, except as it indicates *whether or not an interest is actually being protected.*" (*Id.* at p. 36 [emphasis supplied].) The Court ultimately held that the mere purpose of obtaining an economic advantage is not sufficient to justify a competitor's inducement of a breach of contract. (*Id.* at pp. 34, 37.) Next, in Collins v. Vickter Manor, Inc. (1957) 47 Cal.2d 875, the Court stated with respect to an interference cause of action against individual officers/directors of a corporation (*id.* at p. 879), "[w]hether or not [the individual defendants] were privileged to cause the corporation to discontinue its relations with plaintiffs, *in the belief that such a course of action was in the best interests of the corporation,* is a matter of defense, to be decided by a resolution of the factual issues presumptively involved [and thus improper to resolve on demurrer]." (*Id.* at p. 883 [emphasis supplied].)

It should be clear from these cases that the privilege should not be based merely upon a defendant's position with respect to the breaching party but upon the defendant's purpose in inducing the breach,[8] Nevertheless, there are a number of authorities which

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[8] This position is reflected in a number of appellate decisions. (Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal.App.3d 200, 227-230 [agency status does not itself entitle one to absolute privilege; " 'The first step is to determine if the relationship between the parties involves the type of interests that the privilege is designed to protect. The second step is to determine whether, in light of the nature and importance of the above relationship, the advisor's intent in inducing the breach was proper. This second step is necessary because . . . the privilege is qualified and not absolute. Where the intent is not proper, the privilege is lost.' "]; Los Angeles Airways, Inc. v. Davis (9th Cir. 1982) 687 F.2d 321, 325- 328 [same, applying California law]; McCabe v. General Foods Corp. (9th Cir. 1987) 811 F.2d 1336, 1339 [same]; Olivet v. Frischling, *supra,* 104 Cal.App.3d at p. 841 ["Thus, a manager or agent may, with impersonal or disinterested motive, properly endeavor to protect the interests of his principal by counseling the breach of a contract with a third party which he reasonably believes to be harmful to his employer's best interests"; unavailable where it is alleged defendant acted to further own interests]; cf. Sade Shoe Co. v. Oschin & Snyder (1984) 162 Cal.App.3d 1174, 1181 ["the privilege 'is at most a qualified

seem to suggest, without much analysis, that it is an absolute privilege.[9]

However, we need not unravel this knot of authority. Even if the defendant's privilege is not absolute the uncontradicted evidence shows the defendants acted not in self-interest (indeed, there is not the slightest indication the individual defendants personally benefitted), but in the Bank's interest by attempting to reduce the Bank's costs through elimination of a highly paid employee, albeit by allegedly impermissible means, and replacing him with lower-paid workers. With this as their purpose, the privilege remains intact even if it is merely qualified and not absolute. (*Los Angeles Airways, Inc., supra,* 687 F.2d at p. 328 ["where, as here, an advisor is motivated in part by a desire to benefit his principal, his conduct in inducing a breach of contract should be privileged"]; *Imperial Ice Co., supra,* 18 Cal.2d at p. 36

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one dependant for its existence upon the circumstances of the case. It is essentially a state-of-mind privilege . . . . The resolution of the issue turns on the defendant's predominant purpose in inducing the breach of the contract' "; therefore third party with financial interest cannot prevail on demurrer]; Culcal Stylco, Inc. v. Vornado, Inc. (1972) 26 Cal.App.3d 879, 883 [same]; Richardson v. La Rancherita (1979) 98 Cal.App.3d 73, 80-81 [one inducing a breach in order to protect a financial interest must do so in good faith]; see Rest.2d Torts, §§ 767-773, pp. 4-52.)

[9] Lawless v. Brotherhood of Painters (1956) 143 Cal.App.2d 474, 478, simply states a servant is privileged to induce breach of a master's contract without any discussion of the factual context. Mallard v. Boring (1960) 182 Cal.App.2d 390, 393-394, simply cites *Lawless;* it also notes defendant's act was the act of the corporation, so there is no inducement separate from the breach itself. Marin v. Jacuzzi (1964) 224 Cal.App.2d 549, 553-554 is an admixture of the concepts of "employment at will," manager's privilege, and—like *Mallard*—the defendant's act beingt that of the corporation. Becket v. Welton Becket & Associates (1974) 39 Cal.App.3d 815, 818, 820, 823, held it was sufficient to establish privilege that the complaint alleged defendant was a corporate officer; however, the case can also be explained on the basis of the defendant's act being that of the corporation. Wise v. Southern Pacific Co. (1963) 223 Cal.App.2d 50, 72-73, is similar. (Also see *Kozlowsky, supra,* 6 Cal.App.3d at p. 599.)

[if conduct justified, ill will toward plaintiff irrelevant.) Since no factual controversy was raised on this point, summary judgment was properly granted on the cause of action for the intentional interference with a contractual right.

VI

BREACH OF COVENANTS AND AGE DISCRIMINATION CLAIMS ARE PRE-EMPTED BY NATIONAL BANK ACT.

Having dispatched the interference with contract cause of action, we turn to the remaining three. As we stated at the outset, the main bulwark of the defense in this case has been the claim of pre-emption. For that reason we begin with an overview of the doctrine of pre-emption.

"The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const, Art VI, cl 2, requires [the reviewing court] to examine congressional intent. Pre-emption may be either express or implied, and 'is compelled where Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.' [¶] Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (Fidelity Federal S. & L. Assn. v. de la Cuesta (1982) 458 U.S. 141, 152-153 [73 L.Ed.2d

664, 674-675], citations omitted. See also (Elsworth v. Beech Aircraft Corp. (1984) 37 Cal.3d 540, 548.)

As applied to national banks, the United States Supreme Court "has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the bank's functions." (Anderson National Bank v. Luckett (1943) 321 U.S. 233, 248 [88 L.Ed. 692, 705].) This application of the pre-emption doctrine to the National Bank Act was reaffirmed in Perdue v. Crocker National Bank (1985) 38 Cal.3d 913. In *Perdue,* the California Supreme Court considered whether California law prohibiting banks from exacting unreasonable charges for processing checks drawn on accounts without sufficient funds was pre-empted by the National Bank Act. The court began by noting that "[a]s the United States Supreme Court explained in *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, [78 L.Ed.2d 443, 104 S.Ct. 615], 'state law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress ....' Defendant bears the burden of persuasion on this issue; '[c]ourts are reluctant to infer pre-emption, and it is the burden of the party claiming Congress intended to pre-empt state law to prove it.' " (38 Cal.3d 913, 936-937 [citations omitted].)

The high court then rejected the Bank's contention that Congress, by comprehensive regulation, had occupied the field of regulation of contracts between national banks and their depositors. "One hundred and fifteen years of practice under the national banking system argue to the contrary. While nationally chartered banks are subject to the paramount authority of the United States, Congress has declined to provide an entire system of federal law to govern every aspect of national bank operations. Consequently, national banks have traditionally been 'governed in

their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by State laws.' As explained in *National State Bank, Elizabeth, N.J. v. Long* [3d Cir. 1980] 630 F.2d 981, '[w]hatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863.... In only a few instances has Congress explicitly pre-empted state regulation of national banks. More commonly, it has been left to the courts to delineate the proper boundaries of federal and state supervision. [¶] The judicial test has been a tolerant one. [National banks'] right to contract, collect debts, and acquire and transfer property are all based on state law.' (P. 985.) Thus the rule is that state laws apply, 'the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge [their] duties ....' " (*Perdue, supra*, 38 Cal.3d at pp. 937-938 [fns. & citations omitted].)

Given this standard and the judicial history of the National Bank Act, we conclude that the act is not a comprehensive statutory scheme occupying the entire field relating to national banks. Consequently, the application of the state statute prohibiting age discrimination by an employer has not been pre-empted by a comprehensive federal statutory scheme which occupies the field. "Where Congress has not pre-empted the entire field, a state law will be upheld if it does not conflict with, or is authorized by, the federal statute." (7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 13, p. 58.) We turn then to the second pre-emption issue, whether the application of the California statute will create an actual conflict with federal law.[10]

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[10] As we have noted, a conflict also arises when "compliance with both federal and state regulations is a physical impossibility ...." (Florida Avocado Growers v. Paul (1963) 373 U.S. 132, 142-143 [10 L.Ed.2d 248, 257].) That type of blatant conflict is not tendered here.

"In addition to express or implied pre-emption, a state law also is invalid to the extent that it 'actually conflicts with a . . . federal statute.' Such a conflict will be found when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (International Paper Co. v. Ouellette (1987) 479 U.S. 481, 491-492 [93 L.Ed.2d 883, 896] [citations & some internal quotation marks omitted].) The "controlling principle" then is that "any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." (Perez v. Campbell (1971) 402 U.S. 637, 652 [29 L.Ed.2d 233, 244].)

The controlling federal statute, § 24 (Fifth), empowers the board of directors of a national bank to "dismiss [designated] officers or any of them at pleasure, . . ."[11] In contrast, the California statute provides in relevant part that "[i]t is an unlawful employment practice for an employer . . . to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action."[12] (Gov. Code, § 12941, subd. (a).) Similarly, as we noted at the outset, the breach of the implied covenant of good faith and fair dealing or the breach of an implied contract not to discharge except for good cause gives rise to a cause of action against the employer for breach of contract. The question to be resolved therefore is whether the state age discrim-

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[11] In carrying out their duties, the board of directors have been conferred with all necessary incidental powers. Thus, under the statute a national bank is empowered "[t]o exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; . . . ." (§ 24 (Seventh).)

[12] By statutory definition, an "employer" includes, with exceptions not relevant here, "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities." (Gov. Code, § 12926, subd. (c).) A person is defined to include "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (Gov. Code, § 12925, subd. (d).)

ination statute and the state causes of action for breach of contract conflict with § 24 (Fifth).

A part of the National Bank Act (12 U.S.C. § 38), § 24 (Fifth) is a stature of Civil War vintage. (Act of June 3, 1864, ch. 106, § 8 [13 Stat. 101].) When enacted, it contemplated a banking system in which the reputation of bank officers was a crucial component of a bank's solvency. This mindset is demonstrated in the early case of Westervelt v. Mohrenstecher (8th Cir. 1896) 76 F. 118. There, holders of a bond posted on the performance of a bank's cashier had refused to honor it on the theory it had expired with a previous one-year term of office given the cashier by the bank. The court rejected the theory, noting it was essential to the financial health of a bank that it have unfettered authority to remove immediately an officer to whom had adhered any suspicion of dishonesty or carelessness. "It follows from this principle that, since the act of congress expressly provides that the cashiers of national banks should hold their offices subject to the pleasure of the board of directors, neither the bank not its board can make time contracts or appointments in violation of that provision." (*Id.* at p. 122; accord Rankin v. Tygard (8th Cir. 1912) 198 F. 795; cf. In re Paramount Publix Corp. (2d Cir. 1937) 90 F.2d 441, 443.) Thus, at the heart of this inviolable dismissal provision is a linkage with public policy protecting the financial stability and fiscal integrity of banks by making it beyond the powers of bank directors to enter into any contract restricting their ability to respond expeditiously to financial threats posed by bank officers. (Obradovich v. Federal Reserve Bank of New York (S.D.N.Y. 1983) 569 F.Supp. 785, 790; Armano v. Federal Reserve Bank of Boston (D.Mass. 1979) 468 F.Supp. 674, 676.) As a result, § 24 (Fifth) has been construed as placing "the fullest responsibility upon the directors by giving them the right to discharge such officers at pleasure." (Copeland v. Melrose National Bank of New York (1930) 241 N.Y.S. 429, 430, affd. 254 N.Y. 632, 173 N.E. 898.)

In light of this historical purpose, it is not surprising that contractual claims of employment rights have been deemed preempted by § 24 (Fifth) and its twins in analogous federal statutes. This has been true whether the claims have been anchored in

express contractual terms, in implied-in-fact covenants, or in covenants implied in law. And for the most part that has been the case whether the breach of the contractual provision also gives rise to a cause of action in tort. Unremarkably, therefore, throughout the years "[t]he case law uniformly [has] interpret[ed] this section and substantially similar provisions as rendering unenforceable, as against public policy, all contractual provisions which do not allow a national banking association to discharge its officers at will without incurring liability for breach of contract." (McGeehan v. Bank of New Hampshire, Nat. Ass'n. (N.H. 1983) 45 A.2d 1054, 1055.)

California has long been in accord with this doctrine with respect to express contractual rights of employment.[13] Thus, in Kozlowsky v. Westminster Nat. Bank, *supra,* 6 Cal.App.3d 593, the president of a national bank sued for breach of his contract of employment. The *Kozlowsky* court held that § 24 (Fifth) overrode any contract to employ such an officer for a fixed term. "By virtue of this statute the board may dismiss an officer without liability for breach of the agreement to employ." (*Id.* at pp. 596-597) The same result was reached in Cox v. First Nat. Bank (1935) 10 Cal.App.2d 302. There the cashier of a national bank brought suit against the bank to recover unpaid salary and for salary during vacation periods. On the salary issue, the *Cox* court noted that "[a] contract with the cashier of a national banking association appointing the cashier for a definite period at a fixed

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[13] There have been four recent California appellate decisions discussing the breadth of § 24 (Fifth)'s pre-emptive effrect. Three of them are no longer precedent (Betz v. National Bank of Southern California (Cal. App.) [249 Cal. Rptr. 625] [finding a *Tameny* cause of action not pre-empted; ordered depublished November 17, 1988]; Schey v. Trans Pacific Nat. Bancorp. (Cal.App.) [266 Cal.Rptr. 39] [holding that a *Tameny* cause of action not preempted, that a cause of action for wrongful removal from a directorship not pre-empted, and that a removal by an executive committee was the delegated act of the board; ordered depublished April 26, 1990]; Wells Fargo Bank v. Superior Court (1990) 218 Cal.App.3d 929 [discussing scope of who may be considered "officers" under § 24 (Fifth); review granted May 23, 1990 (S014994)]); the fourth we will discuss presently.

salary is void and does not prevent his removal at any time by the board of directors. It will not support an action for damages for discharge nor permit recovery of salary accruing after such discharge." (*Id.* at p. 305.)

Numerous sister state decisions through the years have thrown out contractual claims against federally-empowered banks which were in derogation of at-will employment or causes of action relying on such a contract. (See, e.g., Van Slyke v. Andrews (1920) 146 Minn. 316 [718 N.W. 959]; Copeland v. Melrose National Bank (1930) 229 App.Div. 311 [241 N.Y.S. 429], *affd. without opn.* 254 N.Y. 632; Kemper v. First Nat. Bank of Newton (1981) 94 Ill.App.3d 169 [418 N.E.2d 819] [noting that since Congress has amended § 24 repeatedly in the face of these interpretations without changing § 24 (Fifth), it has impliedly approved the uniform body of law barring contract actions]; *EIB, supra,* 633 S.W.2d 432; Alfano v. First National Bank of Highland (1985) 111 A.D.2d 960 [490 N.Y.S.2d 56]; Berry v. American Federal Sav. (Col.App. 1986) 730 P.2d 905; Ambro v. American Nat. Bank & Trust Co. (1986) 152 Mich.App. 613 [394 N.W.2d 46]; Hawkins v. Peoples Federal Sav. & Loan Asso. (1986) 155 Mich.App 237 [399 N.W.2d 484]; see St. Yves v. Mid State Bank (1987) 50 Wash.App 95, 101, fn. 3 [748 P.2d 633] [noting federal banking law overrides contracts, declining to do so under state law].[14]

There are a handful of more recent federal cases which are significant for purposes of our review of claims based upon express or implied covenants. In Armano v. Federal Reserve Bank of Boston, *supra,* 468 F.Supp. 674, an employee of the defendant bank brought an action for breach of contract as well as another claim. The Federal Reserve Act contains a provision similar to

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[14] A number of courts have held this doctrine precludes any reasonable expectation in continued employment as well, so no property interest for due process purposes can develop. (Shepherd v. Jones (1982) 136 Cal.App.3d 1049, 1058; Scott v. Federal Reserve Bank of New York (S.D.N.Y. 1989) 704 F.Supp. 441, 447; Little v. Federal Reserve Bank of Cleveland (N.D.Ohio 1988) 601 F.Supp. 1372, 1375; Jaffe v. Federal Reserve Bank of Chicago (N.D.Ill. 1984) 586 F.Supp. 106, 107-108.)

§ 24 (Fifth) whereby the board of directors is empowered "to dismiss at pleasure such officers or employees." (12 U.S.C. § 341, Fifth.) The district court noted that plaintiff alleged in his complaint that he was terminated without just cause in violation of his contract with defendant. "Clearly, a contract that binds the Bank by requiring just cause for dismissal prevents the Bank from exercising its express power to dismiss an employee at pleasure. By that provision, Congress clearly sought to protect Federal reserve banks from unnecessary restrictions in carrying out their financial responsibility." (*Armano, supra*, 468 F.Supp. at 676.) Noting that the judicial interpretation of § 24 (Fifth) in the National Bank Act supported its construction of the statute, the court held that "an employment contract that restricts the Bank's statutory right to terminate at will is in violation of 12 U.S.C.A. § 341, Fifth, and, therefore, unenforceable." (*Ibid.*)

The Ninth Circuit, construing the same analogous provision in the Federal Reserve Act, rejected the claim of a discharged federal reserve bank employee that under California law he was an "at-will" employee who was entitled to a hearing before being terminated. (Bollow v. Federal Reserve Bank of San Francisco (9th Cir. 1981) 650 F.2d 1093.) The *Bollow* court concluded that "attempts to create such rights by reference to independent sources are violative of the statute and void thereunder. Assuming that [the employee] would indeed have been entitled to certain process rights under California law, such law when applied to reserve bank employees conflicts with section Four, Fifth. In such circumstances, the federal statute must control." (*Id.* at p. 1098.) These two decisions were followed without additional discussion in *Obradovich, supra*, 569 F.Supp. at page 790.

In Inglis v. Feinerman (9th Cir. 1983) 701 F.2d 97, the Ninth Circuit, this time construing the Federal Home Loan Bank Act, reached the same conclusion with respect to a *Tameny* cause of action. (Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167.) Under that act, the bank is empowered "to dismiss at pleasure [its] officers, employees and agents; . . . " (12 U.S.C. § 1432(a).) There a discharged bank employee argued that the bank's right to terminate its employees under the statute should be restricted when the grounds for termination contravene public

policy. The *Inglis* court noted that the employee "argues that 12 U.S.C. § 1432(a) should be similarly limited and claims that the real reason for his termination was his insistence that the Bank conform its practices to federal law. We hold that § 1432(a) permits no inroads into the 'dismiss at pleasure' language." (*Inglis, supra*, 702 F.2d at p. 99.)

This long line of cases supports the proposition that employment rights of officers of national banking associations which conflict with the right of the board of directors to dismiss them at pleasure are pre-empted by § 24 (Fifth) whether those rights arise by virtue of an agreement or are imposed by state law, and whether framed as contractual or tortious causes of action. As these cases illustrate, the essential Congressional purpose reflected in the "at pleasure" provision of § 24 (Fifth) was to confer upon the board of directors sweeping powers of dismissal in order to insure the fiscal integrity of national banks and to instill public confidence in those financial institutions. State-based employment rights which inhibit or reduce the power of the board to dismiss its officers "at pleasure" thus conflict with § 24 (Fifth) and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Since these state-based claims would frustrate the full effectiveness of federal law by diminishing the full power of the board to dismiss its officers for the benefit of national banks, they must fall under the supremacy clause.

For the same reasons, we conclude that the age discrimination cause of action is also pre-empted by § 24 (Fifth). In analogous circumstances, the federal courts have held that state antidiscrimination causes of action may not proceed. Thus, in Ana Leon T. v. Federal Reserve Bank of Chicago (6th Cir. 1987) 823 F.2d 928, 931, an employee of Columbian origin was discharged from her employment with a reserve bank. She then filed an action in the federal district court claiming discrimination under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) and the Michigan antidiscrimination act. The lower court dismissed the action for failure to state a claim. The employee appealed and the Sixth Circuit affirmed. "Leon's claim was also examined under Michigan's Elliott-Larsen Act. That Act creates certain rights in

employment under state law in Michigan. For example, an employer is prohibited from discriminating against an individual with respect to employment on account of race, color, national origin, religion, age, sex, weight, height, or marital status. However, inasmuch as Leon was an employee of a Federal Reserve Bank, her rights under the Elliott-Larsen Act were pre-empted by federal law. Section 4, Fifth, of the Federal Reserve Act, 12 U.S.C. § 341, Fifth, specifically provides that employees of a Federal Reserve Bank may be dismissed 'at pleasure.' This provision pre-empts any state-created employment right to the contrary. [¶] Although a claim of discrimination based on national origin could not have been brought under the Elliott-Larsen Act, Leon could have brought her claim under Title VII of the Civil Rights Act of 1964." (*Id.* at p. 931.) However, since it was unclear whether the employee timely brought her claim under title VII, the court remanded the Title VII claim for further consideration. (*Id.* at p. 932.) For similar reasons, Osei-Bonsu v. Federal Homer Loan Bank of New York (S.D.N.Y. 1989) 726 F.Supp. 95, 97-98, reached the same conclusion with respect to employees of Federal Home Loan Banks which are empowered to "dismiss at pleasure [their] officers, employees, attorneys, and agents; . . . " (12 U.S.C. § 1432(a).) The court held that a state rights agency had no jurisdiction over a claim of racial discrimination against the banking institution in question by virtue of dismiss-at-pleasure language in the relevant federal statute.

Plaintiff counters that the pre-emption doctrine cannot be applied to his state age discrimination claim because Congress has enacted a comparable antidiscrimination statute. By that enactment, he contends, "Congress intended and encouraged states themselves to enact far broader regulations prohibiting discrimination on the basis of age by specifically stating that Federal Law does not affect the jurisdiction of state agencies performing 'like functions.' " It is true that Congress has enacted the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) banning age discrimination by employers employ-

ing more than 20 persons in industries affecting commerce.[15] (29 U.S.C. §§ 623, 630, subd. (a) & (b).) It is also true that the federal age discrimination statute further provides that "[n]othing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action." (29 U.S.C. § 623, subd. (a).) Plaintiff argues that this savings clause reflects "a Congressional intent that States may enact broader statutes prohibiting age discrimination. Consequently, there is no conflict between the statutes that prohibit discrimination in employment on the basis of age and the dismissal at pleasure language in the national bank act." We disagree. It is not reasonable to read this savings clause as reflecting a congressional intent that state age discrimination statutes may nullify federal legislation. Plaintiff, not surprisingly, cites no authority for such a novel claim. The federal age discrimination act provides no exception for national banks (or any form of federally chartered financial institution) and since it was enacted long after the National Bank Act it may well be that under "familiar statutory interpretation, when there is such a conflict, the most recent and more specific congressional pronouncement will prevail over a prior, more generalized statute." (National Resources Defense Council v. U.S.E.P.A. (1st Cir. 1987) 824 F.2d 1258, 1278; see also Morton v. Mancari (1974) 417 U.S. 535, 550 [41 L.Ed.2d 290, 300]; Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal.App.3d 656, 664; 2A Sutherland, Statutory Construction (4th ed. 1984) § 51.02, pp. 453-454.) But even if pre-emption can no longer be applied to those large banks, it does not follow that Congress intended that small national banks exempted from the provisions of the federal age discrimination statute because of size should be bound by more sweeping state statutes. By implication, Congress arguably has decreed that national banks with 20 or more employees are bound by the federal age discrimination statute. But as to

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[15] This federal statute has no application to the defendant Bank in this case because at all relevant times it never employed 20 or more employees.

national banks with less than 20 employees, the National Bank Act and the federal discrimination statute are not irreconcilable. Thus, a repeal by implication cannot be asserted as to exempted small national banks because there is no conflict as to them between § 24, Fifth, of the National Bank Act and the federal Age Discrimination in Employment Act. As to those small national banks, the board of directors still retain the power to dismiss their officers "at pleasure" without regard to age, a power conferred by a federal statute which has never been repealed. Consequently, the extant federal statute prevails and a conflicting state statute cannot be applied to small national banks having less than 20 employees. (See, e.g., E. E. O. C. v. County of Santa Barbara (9th Cir. 1982) 666 F.2d 373, 378.)

Plaintiff's reliance upon Simpson v. Alaska State Com'n for Human Rights (D. Ala. 1976) 423 F.Supp. 552, is misplaced. In *Simpson*, the defendant employer contended that the Alaska age discrimination statute had been pre-empted by the federal act. The District Court rejected that claim, noting that Congress only intended to establish minimum standards in the federal act. (*Id.* at p. 556.) "Since there are no specific conflicts between the state and federal statutes and since Congress has expressly left the states the power to act in this field, the fact that Alaska has gone beyond the federal government in enacting a complementary scheme in this area does not make the Alaska law void." (*Ibid.*) In this case, unlike *Simpson*, there is a conflict between a federal statute, namely the unimpaired portion of § 24, Fifth, and the California statute. Because there is an actual conflict, the state statute must give way.

Since the state age discrimination statute cannot be constitutionally be applied to national banks, it follows that the trial court did not err in granting summary judgment in favor of both the Bank and the individuals defendants. (Bollow v. Federal Reserve Bank of San Francisco, supra, 650 F.2d 1093, 1098.)

DISPOSITION

The judgment is affirmed. Defendants shall receive their costs of appeal. (CERTIFIED FOR PUBLICATION.)

SPARKS

We concur:
SIMS, J.
SCOTLAND, J.

Exhibit B

Order Denying Review

After Judgment by the Court of Appeal

Third Appellat District No. C005605
S018437

In the Supreme Court of the
State of California

In Bank

Robert G. Aalgaard,
Appellant

v.

Merchants National Bank Inc. Et Al.,
Respondents

[Filed Jan. 4, 1991]

Appellant's petition for review Denied.

Mosk, J. is of the opinion the petition should be granted.

Lucas
Chief Justice

Exhibit C

ROBERT G. AALGAARD
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Wilton, California 95693
Telephone: (916) 687-8790

In Pro Se

In the Supreme Court
of the
United States of America

Robert G. Aalgaard,
Plaintiff/Appellant,

vs.

Merchants National Bank, Inc.,
Thomas Bolton, Jr., Louis Favre, et al.,
Defendants/Appellees

Court of Appeal
Third Appellate District for the State of California
C005605 S018437

TO: Chief Justice William H. Rendquist
United States Supreme Court:

I

PRELIMINARY STATEMENT

This document is a motion for extension of time to file a Writ of Certiorari before the United States Supreme Court in the case of *Robert G. Aalgaard v. Merchants National Bank Inc., Sam Holton, Jr., Lewis Favre, et al.* from the Court of Appeal, Third Appellate District for the State of California pursuant to Supreme Court Rules 13, 21, 22, 30, 34.

II

JURISDICTION OF THE COURT

This action is properly before the Court pursuant to 28 USC, Section 2101(c) since this is a Petition for Writ of Certiorari in a civil action within ninety (90) days after entry of judgment or decree by the California Court of Appeal, Third Appellate District in this matter. The Court of Appeal, rendered their decision and entered judgment against Appellant on October 10, 1990. (See Exhibit A.) On January 4, 1991, the Supreme Court of the State of California denied Appellants' Petition For Review. (See Exhibit B.)

Pursuant to Rule 10.1(c) of the Supreme Court Rules of Court, the decision of the California Court of Appeal, Third Appellate District has decided an important question of Federal Law, which has not been, but should be, settled by this Court. Namely, whether Section 24 (Fifth) of the National Bank preempts state and federal anti-discrimination statutes.

III

REASON WHY GRANTING AN EXTENSION OF TIME IS JUSTIFIED

Plaintiff/Appellant Robert G. Aalgaard respectfully requests an extension of time to file a Writ of Certiorari before the Court due to most extraordinary circumstances. Appellant's attorney has not yet been admitted to practice before the United States Supreme Court. Appellant's counsel is awaiting receipt of a certificate from the California Supreme Court evidencing the counsel's admission and good standing to practice in the State of California. Appellant's counsel expects to receive said certification within five (5) to ten (10) working days. In addition, Appellant's counsel is awaiting statements from two (2) sponsors pursuant to Rule 5, who must be members of the Bar of this Court and must personally know, but not be related to, the counsel, endorsing the correctness of counsel's statement, stating that counsel possesses all qualifications required for admission, and affirming that counsel is of good moral and professional

character. Appellant's counsel expects to receive these statements within five (5) to ten (10) working days. Furthermore, Appellant's counsel was informed by the printing company who is preparing Appellant's Writ of Certiorari, that they will need an additional five (5) to ten (10) working days to prepare the Writ to comply with Rule 33.

The last day for filing a Petition for Writ of Certiorari before the United States Supreme Court in this matter is April 5, 1991. Therefore, Plaintiff/Appellant pro se requests that the Court accept this petition under his signature pro se, and grant an extension of time of at least fifteen (15) days for filing a Petition for Writ of Certiorari with this Court.

Dated: March 29, 1991

/s/ ROBERT G. AALGAARD
ROBERT G. AALGAARD
In Pro Se